No. 09-1546

JUL 21 2010

In The

Supreme Court of the United States

W.R. GRACE & CO., *et al.*,

Petitioners,

v.

MARGARET CHAKARIAN, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Third Circuit correctly concluded that bankruptcy courts are courts of limited jurisdiction that lack subject matter jurisdiction to enjoin state-law claims against a non-debtor that are not "related to" a bankruptcy case, within the meaning of 28 U.S.C. § 1334(b).

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INTRODUCTION

Petitioner W.R. Grace & Co. ("Grace") has presented no compelling reasons for its Petition for a Writ of Certiorari ("Petition") to be granted. *See* Sup. Ct. R. 10. Specifically, Grace fails to demonstrate that the Third Circuit's December 31, 2009 decision is in conflict with a decision of this Court or another Court of Appeals, or that the Third Circuit decided an important federal question that has not been settled by this Court or conflicts with relevant decisions of this Court. *See* Sup. Ct. R. 10 (a)-(c).

The Third Circuit's decision in this case did not make new law. It simply upheld denial of an injunction requested by Grace as being beyond the bankruptcy court's statutory jurisdiction under 28 U.S.C. § 1334(b), as interpreted by this Court in *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995), and by the Courts of Appeal in numerous cases including *In re Combustion Engineering, Inc.*, 391 F.3d 190, 224-25 (3d Cir. 2004); *Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 751 (5th Cir. 1995); *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 162 (7th Cir. 1994).

Contrary to Grace's assertion in the Petition, this case does not implicate the Anti-Injunction Act or *Younger* abstention. The Third Circuit denied the requested injunction on other grounds. There was no need to apply these special protections against federal injunctive power.

This case does not implicate *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), and its progeny. The statute applied by the Third Circuit, 28 U.S.C. § 1334(b), is unquestionably jurisdictional. This case presents no confusion between jurisdictional and substantive limitations other than what Grace now attempts to sow.

There is no conflict among the circuits or with decisions of this Court concerning the jurisdiction of federal courts to enjoin litigation pending elsewhere. The long line of cases establishing that federal courts lack *bankruptcy jurisdiction* to enjoin litigation among third parties in other fora unless the federal courts have *bankruptcy jurisdiction* over the target litigation (*i.e.*, the target litigation is related to the bankruptcy case) do not conflict with the cases Grace cites applying certain *non-bankruptcy jurisdictional schemes* in which litigation among third parties was enjoined even though there was no federal jurisdiction over the target litigation. Any differences between these groups of cases simply reflect differences in the types of federal jurisdiction they concern. A conflict exists only in the eyes of Grace.

Stripped of the fig leaf of federalism, *Arbaugh* or a conflict among the courts, Grace's request for *certiorari* rests on its own need to propel this Court toward a radical expansion of bankruptcy jurisdiction in order for Grace to have a shot at obtaining an injunction impermissible under current law. Heretofore, courts have uniformly analyzed bankruptcy jurisdiction to enjoin non-bankruptcy litigation as a

matter of related-to jurisdiction under 28 U.S.C. § 1334(b): Is the non-bankruptcy litigation "related to" the bankruptcy case within the meaning of the statute, as developed by this Court (in *Celotex*) and extensively by the Courts of Appeals? The standard adopted by the courts is that non-bankruptcy litigation is related to a bankruptcy case if it would automatically affect the bankruptcy estate without the need for another legal proceeding. This is the same standard used to determine whether the bankruptcy court may exercise jurisdiction to actually adjudicate the non-bankruptcy litigation, hence Grace's stratagem of mounting a general attack on the idea that a court needs to have jurisdiction over litigation in order to enjoin it.

Grace proposes to eliminate any requirement that non-bankruptcy litigation be related to the bankruptcy case in order for the bankruptcy court to have jurisdiction to enjoin it. Rather, Grace would have this Court rule that bankruptcy courts have jurisdiction to enjoin any non-bankruptcy litigation, so long as the injunction is sought in an adversary proceeding commenced within the bankruptcy case. Grace proposes to abandon all substantive limitations on this type of bankruptcy jurisdiction, even while acknowledging that "few federal judicial powers are more consequential than the power to enjoin state proceedings." Petition at 1. The Third Circuit appropriately rejected Grace's position as far-fetched:

> That notion stands in stark contrast to the basic premise that "federal courts are courts

> of limited jurisdiction; they exercise only the authority conferred on them by Art. III and by congressional enactments pursuant thereto." *Delaware v. Van Arsdall*, 475 U.S. 673, 692 (1986). The existence of a bankruptcy proceeding itself has never been and cannot be an all-purpose grant of jurisdiction.

Petition Appendix ("App.") 20a.

In sum, as is discussed in more detail below, there is no reason – let alone any compelling reason – for the Petition to be granted.

STATEMENT OF THE CASE

Background

The suffering of the people of Libby, Montana (population of 2,600) due to asbestos disease from exposure to asbestos originating from Grace's mine and mill in the Libby area is well chronicled.[1] But the devastating disease in Libby, said to be far more deadly than more common types of asbestosis, was not caused by Grace alone. The State of Montana (the "State") also engaged in tortious conduct injuring the

[1] *See An Air That Kills – How the Asbestos Poisoning of Libby, Montana Uncovered a National Scandal*, A. Schneider and D. McCumber, G.H. Putnam's Sons, 2004; *Libby, Montana – Asbestos and the Deadly Silence of an American Corporation*, A. Peacock, Johnson Books, 2003; and *Fatal Deception*, M. Bowker, Rodale, 2003.

people of Libby. In *Orr v. State of Montana*, 106 P.3d 100 (Mont. 2004), the Montana Supreme Court held that under the state's Industrial Hygiene Act, "the State had statutory duties to the public and persons confronted with workplace hazards," *id.* at 110, ¶ 40, and that "the State had discretion to determine what information to gather, but once that information was gathered, it had no discretion about whether to distribute it." *Id.* at 108, ¶ 25. The court noted: "[I]t appears that the record is bereft of any actions taken by the State to warn the miners or the Libby townspeople of their plight." *Id.* at 110, ¶ 37. Denying the State's motion to dismiss, the Montana Supreme Court remanded the cases for trial. Grace sought to enjoin the litigation by actual and potential Libby plaintiffs (the "Libby Claimants") against the State (the "State Litigation").[2] The Bankruptcy Court issued a series of "temporary stays" until the District Court's denial of a stay pending appeal finally permitted the State Litigation to proceed.

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[2] Respondents – who are defined in the pleadings below as the "Libby Claimants" – are former Grace workers, spouses of such workers and residents of Libby during the period of Grace's operation there, as specifically identified in various statements under Fed. R. Bankr. P. 2019 filed with the Bankruptcy Court from time to time. The injunction sought by Grace would apply to any person seeking to sue the State of Montana on grounds similar to the State Litigation, regardless of whether they are "Libby Claimants" represented by counsel in the bankruptcy case.

Libby Claimants continue to suffer and die, without medical coverage for end stage care. Compounding its failure to provide the care that the Libby Claimants need and deserve, Grace has sought to prevent them from obtaining compensation in the tort system from the State. In the Petition Grace characterizes the State Litigation as an attempt by the Libby Claimants "to pursue their claims against Grace indirectly." Petition at 5. This is a blatant misstatement. As just noted, the Montana Supreme Court has determined that the State had its own duty to the Libby Claimants apart from any wrongdoing by Grace.

Grace's attempt to "expand" to the State Litigation the preliminary injunction that Grace obtained early on its bankruptcy case to stay asbestos-related claims against its insurers and affiliates (the "Preliminary Injunction") goes far beyond the original purpose of the Preliminary Injunction, and far beyond the typical case where the debtor in a mass tort case seeks to enjoin suits against its insurers (to prevent insurance from being consumed in a race to the courthouse) and affiliates such as directors and officers. Rather, in direct contradiction to the consistent teachings of this Court, the Third Circuit and other Courts of Appeals, Grace seeks to shield a non-debtor party from ongoing litigation that cannot, as a matter of law, have a direct impact on Grace's estate.

In the lower courts, Grace cloaked its arguments as an attempt to distinguish three long-standing

decisions of the Third Circuit, *Combustion Engineering*, *In re Federal-Mogul Global, Inc.*, 282 B.R. 301 (D. Del.), *mandamus denied*, 300 F.3d 368 (3d Cir. 2002), *cert. denied sub nom. Daimler Chrysler Corp. v. Official Comm. of Asbestos Claimants*, 537 U.S. 1148 (2003), and *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984).[3] In reality Grace sought to overturn these influential and widely approved decisions. These decisions establish that bankruptcy courts do not have jurisdiction to enjoin litigation among non-debtor parties merely because the defendant claims a right of contribution or indemnity against the debtor – as the State does here. The Bankruptcy Court properly recognized this established Third Circuit precedent in its orders denying Grace's request to enjoin the State Litigation, as did the District Court in its order affirming the Bankruptcy Court's decision and the Third Circuit in affirming both the District and Bankruptcy Court decisions. Faced with the unassailable analysis employed by the three courts that have already ruled against Grace, Grace has shifted gears in the Petition, eliminating all discussion of these seminal cases (although still seeking

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[3] In attempting to distinguish these cases, Grace principally relied on the Third Circuit's non-precedential panel opinion in *Carol Gerard v. W.R. Grace & Co. (In re W.R. Grace & Co.)*, 115 Fed. Appx. 565 (3d Cir. 2004). But each of the lower courts found *Gerard* to be inapposite to this case. In the Petition, Grace twice cites *Gerard* while failing to inform the Court that this decision was rendered as a non-precedential opinion.

to overturn them) and instead dishing up arguments about federalism, *Arbaugh* and conflicts among the courts – issues that were barely, if at all, presented to the courts below.

Procedural History

On April 2, 2001, Grace filed petitions for relief under Chapter 11 of the Code. On the same date, Grace filed an adversary complaint in the Bankruptcy Court (No. 01-771) seeking, *inter alia*, the Preliminary Injunction. The Bankruptcy Court entered a temporary restraining order on April 2, 2001, and on May 3, 2001 entered the Preliminary Injunction sought by Grace. *See* App. 75-82a. On January 22, 2002, the Bankruptcy Court entered an order modifying the Preliminary Injunction to expand its scope to include certain additional affiliates of Grace. *See* App. 69-74a.

Prior to and after Grace's Chapter 11 filing, Libby Claimants commenced the State Litigation in the Montana District Courts for Lincoln, Cascade, and Lewis and Clark Counties. The State Litigation proceeded uninterrupted by and without involvement of Grace until August 22, 2005, more than four years after Grace entered Chapter 11. On that day, Grace filed a motion to expand the Preliminary Injunction to include the State Litigation. D. Del. Bankr. No. 01-771 Dkt. 359. The Libby Claimants filed an opposition to that motion. D. Del. Bankr. No. 01-771 Dkt. 363.

On April 16, 2007, the Bankruptcy Court ruled that "related-to subject matter jurisdiction does not exist for the purpose of expanding the injunction to include the [State Litigation]." App. 53a. In response, Grace and the State filed motions to reconsider on April 26, 2007. D. Del. Bankr. No. 01-771 Dkt. 426, 427. On May 14, 2007, the Libby Claimants filed an opposition to the motions for reconsideration. D. Del. Bankr. No. 01-771 Dkt. 442. After oral argument on May 21, 2007, the Bankruptcy Court on March 31, 2008 denied reconsideration, ruling, as before, that the Bankruptcy Court lacks subject matter jurisdiction over the State Litigation. *See* App. 54-68a.

On April 11, 2008, Grace filed a motion for leave to appeal the Bankruptcy Court's interlocutory order. D. Del. Bankr. No. 01-771 Dkt. 495. On April 21, 2008, the Libby Claimants filed an opposition to the motion. D. Del. Bankr. No. 01-771 Dkt. 505. The District Court granted the motion but affirmed the Bankruptcy Court's order denying Grace's request to enjoin the State Litigation for lack of subject matter jurisdiction. *See* App. 25-37a. Grace appealed to the Third Circuit. D. Del. No. 08-246 Dkt. 19. Efforts by Grace and the State to obtain a stay pending appeal were denied by both the District Court and the Third Circuit. D. Del. No. 08-246 Dkt. 32; Third Cir. No. 08-3720 Dkt. 1/14/09 (Order). On December 31, 2009, the Third Circuit affirmed the Bankruptcy Court and District Court decisions, holding that "a federal bankruptcy court does not have related-to jurisdiction over a third-party lawsuit if that lawsuit would affect

the bankruptcy proceeding only through the intervention of yet another lawsuit." App. 22a.

Grace filed the Petition on June 18, 2010.

REASONS FOR DENYING THE PETITION

This Court should deny the Petition because Grace has failed to present any compelling reasons for granting it. There is no merit to Grace's argument that the Third Circuit's decision in this case implicates the Anti-Injunction Act, *Younger v. Harris*, 401 U.S. 37 (1971), or *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), and its progeny. Nor is the Third Circuit's decision inconsistent with this Court's precedents or the decision of any other Circuit. Indeed, as Grace comes close to acknowledging in the Petition,[4] its real complaint is with the time-honored principles governing bankruptcy jurisdiction that this Court approved and applied in *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995). Grace's arguments were properly rejected by the Third Circuit, and are not worthy of this Court's review.

Grace's position that this case implicates the Anti-Injunction Act and *Younger* abstention is presented resoundingly in the introduction to the Petition, and then almost not heard from again. It

[4] "If anything, *Celotex* underscores the endemic confusion engendered by the word 'jurisdiction.'" Petition at 15.

should be rejected as a transparent effort to distract the Court from what the Third Circuit actually did. The Third Circuit upheld the bankruptcy and district courts' determination that it was beyond their jurisdiction to enjoin litigation among non-debtor parties that was not "related to" Grace's bankruptcy case within the meaning of the bankruptcy jurisdictional statute, 28 U.S.C. § 1334(b). In a word, the Third Circuit rejected the injunction. Grace stands the Anti-Injunction Act and *Younger* abstention on their head by invoking them to support *granting* an injunction against state court litigation. The Third Circuit had no need to reach the Anti-Injunction Act or *Younger* abstention doctrine because, like the District Court and Bankruptcy Court, the Third Circuit ruled on other grounds that the requested injunction was beyond the bankruptcy court's jurisdiction. Moreover, although Grace hoists the banner of federalism, it is mere happenstance that the litigation Grace sought to enjoin was pending in state court. The question of when bankruptcy courts have jurisdiction to enjoin non-bankruptcy litigation applies to litigation pending in federal court as well as state courts, and was properly resolved by the courts below through a uniform standard appropriately protective of non-bankruptcy litigation regardless of forum.

That standard has been amply addressed by this Court, and applied repeatedly and consistently by the Courts of Appeals. *See Celotex*, 514 U.S. at 308; *In re Combustion Engineering, Inc.*, 391 F.3d 190, 224-25

(3d Cir. 2004); *Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 751 (5th Cir. 1995); *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 162 (7th Cir. 1994).[5] In each of these cases, bankruptcy court jurisdiction to enjoin litigation among non-debtor parties was properly challenged. And in each case, the court employed the same analysis as did the Third Circuit in this case.

The Third Circuit's decision properly recognizes that the jurisdiction of bankruptcy courts is grounded in and limited by statute. *Celotex*, 514 U.S. at 307; 28 U.S.C. § 1334(b); 28 U.S.C. § 157(a). Section 1334(b) provides that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." In turn, Section 157(a) permits the district court to refer "any or all proceedings arising under title 11 or arising in or related to a case under title 11 . . . to the bankruptcy judges for the district." *Celotex*, 514 U.S. at 307 (*quoting* 28 U.S.C. § 157(a)).

The statutory scheme creates three prongs of bankruptcy jurisdiction: (1) proceedings ***arising under*** the Bankruptcy Code; (2) proceedings ***arising in*** a case under the Bankruptcy Code; and (3) proceedings ***related to*** a case under the Bankruptcy Code. Since the litigation sought to be enjoined (the

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[5] *See also Travelers Casualty and Surety Co. v. Chubb Indemnity Insurance Co. (In re Johns-Manville Corp.)*, 517 F.3d 52, 65 (2d Cir. 2008), *rev'd on other grounds*, 129 S.Ct. 219 (2009).

"target litigation") in *Celotex*, *Combustion Engineering*, *Zale* and *Zerand-Bernal* (like the claims of the Libby Claimants against the State) did not arise under the Bankruptcy Code or in a bankruptcy case, each court examined whether the claims among non-debtors in the target litigation were "related to" the Chapter 11 case. *Celotex*, 514 U.S. at 309-11; *Combustion Engineering*, 391 F.3d at 224-30; *Zale*, 62 F.3d at 751-56; *Zerand-Bernal*, 23 F.3d at 161-64.

To determine whether "related to" jurisdiction exists, courts have universally adopted the test first articulated by the Third Circuit in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984):

> A matter is related to the bankruptcy case for §1334 purposes if the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy. . . . Moreover, an action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options or freedom of action (either positively or negatively) and in any way impacts upon the handling and administration of the bankruptcy estate.

Id. at 994. Applying this standard, the *Pacor* court held that related-to jurisdiction did not extend to personal injury litigation between non-debtor parties even though the non-debtor third party defendant claimed a right of indemnity or contribution from the debtor:

> At best, [the personal injury lawsuit] is a mere precursor to the potential third party

> claim for indemnification by Pacor against Manville. Yet the outcome of the [the personal injury lawsuit] would in no way bind Manville, in that it could not determine any rights, liabilities, or course of action of the debtor. Since Manville is not a party to the [the personal injury lawsuit], it could not be bound by res judicata or collateral estoppel.

Id. at 995. Accordingly, the Third Circuit concluded that

> there would be **no automatic creation of liability** against Manville on account of a judgment against Pacor. Pacor is not a contractual guarantor of Manville, nor has Manville agreed to indemnify Pacor, and thus a judgment in the [the personal injury lawsuit] could not give rise to any automatic liability on the part of the estate. All issues regarding Manville's possible liability would be resolved in the subsequent third party impleader action. . . . There would therefore be no effect on administration of the estate, until such time as Pacor may choose to pursue its third party claim.

Id. at 995-96 (emphasis added).[6] Since the Chapter 11 debtor could not be bound **automatically** by the

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[6] Since *Pacor* the Third Circuit has moved away from its *dicta* implying that related-to jurisdiction would exist where the defendant in the non-bankruptcy litigation holds a *contractual* indemnity from the debtor, since in a contractual indemnity case (just as with common law indemnity or contribution) the debtor's estate will be liable only if determined to be so in a

(Continued on following page)

litigation, the litigation could not affect the estate and thus was not, in the jurisdictional sense under 28 U.S.C. § 1334, "related to" the debtor's Chapter 11 case. *Id.*

Pacor has been expressly approved by this Court. *Celotex*, 514 U.S. at 308. The Third Circuit has confirmed the on-going vitality of *Pacor* in *Combustion Engineering*, 391 F.3d at 225-27, and *In re Federal-Mogul Global, Inc.*, 282 B.R. 301 (D. Del.), *mandamus denied*, 300 F.3d 368 (3d Cir. 2002), *cert. denied sub nom. Daimler Chrysler Corp. v. Official Comm. of Asbestos Claimants*, 537 U.S. 1148 (2003). The Courts of Appeal have universally followed *Pacor*. *See Celotex*, 514 U.S. at 308, n.6.

Grace tries to sneak around the jurisdictional requirement by arguing that its injunction request need not meet the "related to" jurisdictional test because the request "arises in" the bankruptcy case – a separate prong of bankruptcy jurisdiction under 28 U.S.C. § 1334(b). It is certainly true that as a procedural matter, the proper way to seek an injunction from a bankruptcy court is to file an adversary proceeding – effectively, a civil action

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separate litigation, in which the estate will not be bound by the non bankruptcy litigation. *See* App. 22a; *Combustion Engineering*, 391 F.3d at 232; *In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 382 (3d Cir. 2002). However, contractual indemnity is irrelevant to the present case since all parties acknowledge that Grace has no agreement to indemnify the State.

within a bankruptcy case. *See* Fed. R. Bankr. P. 7001(7). But commencement of an adversary proceeding or any other civil action in federal court does not establish the court's jurisdiction to hear it. An independent jurisdictional basis is required. As the Third Circuit correctly observed, if Grace's position were accepted "a bankruptcy court would have power to enjoin any action, no matter how unrelated to the underlying bankruptcy it may be, so long as the injunction motion was filed in the adversary proceeding." App. 20a. This is simply not the law and would represent a drastic departure from the principle that federal courts are courts of limited jurisdiction.

The only basis offered by Grace for the requested injunction is Section 105(a) of the Bankruptcy Code, the bankruptcy version of the All-Writs Act providing that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." Grace's position that a court may leap immediately to Section 105(a) – which Grace claims provides the "substantive power" for the bankruptcy court to enjoin non-bankruptcy litigation – without examining its own jurisdiction to do so contravenes the well-established principle that Section 105 "does not provide an independent source of federal subject matter jurisdiction." *Combustion Engineering*, 391 F.3d at 225. *Accord*, *In re Johns-Manville Corp.*, 801 F.2d 60, 63 (2d Cir. 1986); *In re Jacksen*, 105 B.R. 542, 544 (B.A.P. 9th Cir. 1989); *In re Nunez*, 2000 WL

655983, at *8 (E.D.N.Y.); *In re Kids Creek Partners*, 248 B.R. 554, 561 (Bankr. N.D. Ill. 2000); *Cunningham v. Pension Benefit Guar. Corp. (In re SiMetco, Inc.)*, 235 B.R. 609, 618 (N.D. Ohio 1999); *In re Cary Metal Products, Inc.*, 158 B.R. 459, 465 (N.D. Ill. 1993); *In re Circle Land and Cattle Corp.*, 213 B.R. 870, 877 (Bankr. D. Kan. 1997).[7] Section 105(a) is properly viewed as only an "aid to the exercise of jurisdiction." *In re Deltacorp, Inc.*, 111 B.R. 419, 420 (Bankr. S.D.N.Y. 1990). A bankruptcy court may not invoke Section 105 to give the court jurisdiction that it does not already possess. *In re S.T.R. Corp.*, 66 B.R. 49, 51 (Bankr. N.D. Ohio 1986). By examining subject matter jurisdiction rather than skipping to the substantive issue of whether the injunction should be issued, the Third Circuit followed long-accepted principles.

Grace offers no reason to reexamine these principles. Instead, Grace dishes up two distractions. First, Grace struggles to shoehorn this case into the series of decisions (*Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), and its progeny) in which this Court has addressed the conflation of jurisdictional and substantive limitations on federal court power. Grace provides no basis for interpreting this line of cases to

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[7] In an analogous non-bankruptcy context, this Court has held – in *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 31-34 (2002), one of the very cases cited by Grace – that the All Writs Act does not serve as an independent basis of federal jurisdiction.

eliminate the need for federal courts to establish their own jurisdiction. Here there can be no doubt that the statute relied upon by the Third Circuit, 28 U.S.C. § 1334(b), is jurisdictional. The *Arbaugh* line of cases does not apply. Grace did not even make this argument below.

Second, Grace invents a spurious conflict between the Third Circuit's decision and various non-bankruptcy cases involving federal court injunctions of state court actions which the federal courts would not have had the jurisdiction to adjudicate. Grace points to *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 34 n* (2002), where this Court, in the context of rejecting an attempted removal of state-court cases to prevent frustration of orders that the federal court had previously issued, dropped a footnote suggesting that the federal court could protect its prior settlement order by issuing an injunction requiring the dismissal of a subsequent, rival state-court action. *Syngenta*, 537 U.S. at 34, n*. And, citing four cases from outside the Third Circuit upholding federal courts' injunctions against proceedings that they would not have had jurisdiction to adjudicate, Grace accuses the Third Circuit of having "exacerbated a circuit conflict on this issue."[8] Then on

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[8] Petition at 17, *citing Jaskolski v. Daniels*, 427 F.3d 456 (7th Cir. 2005); *Entergy, Ark., Inc. v. Nebraska*, 210 F.3d 887 (8th Cir. 2000); *Gilliam v. Foster*, 61 F.3d 1070 (4th Cir. 1995); and *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994).

the very next page of the Petition, Grace cites a Third Circuit decision upholding just such an injunction.[9] Grace has certainly not made out a conflict among the circuits. The conflict, if there is one, can only be between the non-bankruptcy cases cited by Grace and the entire line of cases concerning bankruptcy jurisdiction to enjoin litigation among non-debtor parties, including *Celotex*, *Combustion Engineering*, *Zale*, *Zerand-Bernal* and others. It would be astonishing for a conflict of this magnitude, if it were real, to have completely escaped the notice of the courts. The conflict seems to exist only in the eyes of Grace.

The asserted inconsistency between the Third Circuit's decision in this case and the various non-bankruptcy decisions in which federal courts have enjoined litigation over which they could not have exercised jurisdiction is based on a faulty premise: that the Third Circuit in this case issued a grand *pronunciamento* to the effect that a federal court may never enjoin litigation pending in another court unless it has jurisdiction over such litigation. The Third Circuit did not so hold. The basis of the Third Circuit's decision is that *under the bankruptcy jurisdictional statute*, non-bankruptcy litigation must be "related to" a bankruptcy case in order to be either enjoined or adjudicated by the bankruptcy court.

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[9] *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 314 F.3d 99, 103 (3d Cir. 2002). *See* Petition at 18.

Suppose that Grace is correct that in various non-bankruptcy contexts, federal courts may enjoin litigation pending elsewhere regardless of whether their jurisdiction would extend to the actual adjudication of such litigation. Suppose, even, that there is some supervening principle that federal courts may always enjoin litigation elsewhere that threatens their own jurisdiction. Regardless, bankruptcy courts have no need for such exotica. Any lawsuit threatening their jurisdiction would by definition be "related to" a bankruptcy case and thus subject to the bankruptcy courts' basic statutory jurisdiction. Just because the bankruptcy jurisdictional scheme deals with threats to federal court jurisdiction through its own jurisdictional statute does not place it in conflict with other federal court jurisdictional schemes that resort to different statutes or to non-statutory principles to protect federal court jurisdiction when threatened.

Perhaps an academic exegesis of bankruptcy court jurisdiction ought to contain a footnote that even if Congress were to repeal "related to" jurisdiction, it would still be within the jurisdiction of the bankruptcy courts, like all other federal courts, to enjoin litigation that threatens their jurisdiction. The Third Circuit can hardly be faulted for declining to propound this *dictum*, especially given that, in this case, the State Litigation represents no threat whatsoever to the bankruptcy court's jurisdiction and Grace never asserted that it does. Thus, this would have been a poor case for the lower courts to explore

the "conflict" that Grace now presses in the Petition. For the same reasons, it would be a poor case in which to grant *certiorari*, and moreover, this Court would not have the benefit of the development of issues by the lower courts in this case or, for that matter, any other case. Let Grace first persuade some other court, preferably a series of courts, that the supposed theoretical inconsistency it has discovered is worth exploring.

The non-bankruptcy cases cited by Grace for the proposition that a federal court may enjoin litigation pending elsewhere regardless of whether it would have the jurisdiction to adjudicate such litigation illustrate two principles, neither of them favorable to the result sought by Grace. First, in each instance the court took pains to show that the target litigation was closely related to a case over which there was unquestionable federal jurisdiction. In *Syngenta*, as noted, the target litigation consisted of state court litigation that conflicted with a settlement order in the federal court. 537 U.S. at 30. Similarly, in *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 314 F.3d 99, 105 (3d Cir. 2002), the target litigation interfered with an earlier, approved settlement and judgment by the federal district court. In *Jaskolski v. Daniels*, 427 F.3d 456 (7th Cir. 2005), a federal court enjoined a state court malicious prosecution action that presented a danger of improper release of federal grand jury materials collected during the federal criminal case. In *Entergy, Ark., Inc. v. Nebraska*, 210 F.3d 887 (8th Cir. 2000), a suit to enforce federal law

obligations against the State of Nebraska which had contractually waived its sovereign immunity defense, the court enjoined an inconsistent state administrative proceeding. In *Gilliam v. Foster*, 61 F.3d 1070 (4th Cir. 1995), a federal court stayed a state criminal proceeding based on specific authorization contained in the federal habeas corpus statute. In *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994), a federal court determined that it had federal question jurisdiction over the Indian tribes' suit seeking to enjoin state prosecutions based upon Indian Gaming Regulatory Act or federal common law of Indian affairs. In each of these cases, federal subject matter jurisdiction existed to enter an injunction because the target action bore a close relationship to – indeed, presented an actual conflict with – a matter over which the federal court had subject matter jurisdiction. In the instant case, by contrast, Grace failed to establish a basis for the proper exercise of jurisdiction by the federal court, which, under the applicable jurisdictional statute, 28 U.S.C. § 1334(b), would have entailed demonstrating that the State Litigation is "related to" Grace's bankruptcy case.

Second, the reason these federal courts had the power to enjoin but not to adjudicate these cases is *not* that federal courts have broader jurisdiction than the Third Circuit supposed in its decision in this case. Rather, it is because those federal courts had narrower jurisdiction than the broad grant of "related to" jurisdiction that Congress has bestowed on the

bankruptcy courts. To put it another way, the reason that the bankruptcy courts' power to enjoin and their power to adjudicate non-bankruptcy litigation are coextensive is because – in contrast to the non-bankruptcy cases cited by Grace – bankruptcy courts operate under such a broad grant of jurisdiction that they can actually adjudicate (as well as enjoin) any case related to the federal case pending before them.[10] The differences between the non-bankruptcy and bankruptcy cases involving injunctions of litigation pending elsewhere are entirely explained by the different jurisdictional scheme governing bankruptcy.

In the end, the "conflict" asserted by Grace is nothing more than the differences between federal jurisdictional schemes that each address a common problem – protecting against threats to their jurisdiction – in different ways. If Congress had meant for this problem to be dealt with in a uniform way, it would have passed a uniform statute. The tools Congress has provided to the bankruptcy courts, in the form of 28 U.S.C. § 1334(b), are more than adequate. Tellingly, despite the breadth of Congress's jurisdictional grant to the bankruptcy courts, Grace was unable to persuade the Bankruptcy Court, the

[10] Of course, this broad grant of jurisdiction in the first instance is tempered by various protective rules not pertinent here. *See, e.g.*, 28 U.S.C. §§ 157(b)(5) and (c)(1) (district courts rather than bankruptcy courts must hear certain types of proceedings) and 1334(c)(2) (federal courts required to abstain from hearing certain state court proceedings).

District Court or the Third Circuit that they had jurisdiction to grant the injunction Grace seeks. Grace has offered no reason why this Court should consider the radical broadening of bankruptcy court jurisdiction advocated by Grace.

CONCLUSION

Grace has failed to demonstrate any inconsistency between the Third Circuit's decision in this case and the precedents of this Court or any other Circuit. There is no reason, let alone any compelling reason, to grant *certiorari*. The Petition should be denied.

Respectfully submitted,

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